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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of	)	MM DOCKET NO. 92-33
	)	
CENTRAL FLORIDA EDUCATIONAL FOUNDATION, INC. Channel 202C3 Union Park, Florida	)	File No. BPED-881207MA
	)	
HISPANIC BROADCAST SYSTEM, INC. Channel 202C3 Lake Mary, Florida	)	File No. BPED-891128ME
	)	
For Construction Permit for a New Noncommercial Educational FM Station	)	

To: The Review Board

MASS MEDIA BUREAU'S REPLY TO EXCEPTIONS

Respectfully submitted,
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Summary

The **Initial Decision** correctly concluded that Central Florida Educational Foundation, Inc. ("Central Florida") should receive a dispositive preference vis-a-vis Hispanic Broadcast System, Inc. ("Hispanic") pursuant to Section 307(b) of the Communications Act of 1934, as amended. Applying the criteria used by the Commission to compare noncommercial applicants that propose to serve different communities, Central Florida prevails because it proposed a superior second noncommercial aural reception service. Hispanic's arguments that it should receive a Section 307(b) preference are either unsupported or contrary to precedent. In addition, the Presiding Judge correctly denied Hispanic's motion to enlarge the issues against Central Florida because Hispanic's allegations did not raise a substantial and material question of fact about the availability of Central Florida's originally specified transmitter site.

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MASS MEDIA BUREAU'S REPLY TO EXCEPTIONS

Preliminary Statement

1. The Mass Media Bureau, pursuant to Sections 1.276 and 1.277 of the Commission's Rules, hereby replies to certain exceptions in the brief of Hispanic Broadcast System, Inc. ("Hispanic") filed on October 16, 1992, to the **Initial Decision of Administrative Law Judge Edward J. Kuhlmann**, FCC 92D-59, released September 16, 1992 ("**Initial Decision**" or "**ID**"). The failure of the Bureau to comment on any other exception or argument in the exceptions should not be construed as a concession on the Bureau's part as to the correctness or accuracy of those exceptions or argument.

Counterstatement of the Case

2. This proceeding originally involved the applications of Central Florida Educational Foundation, Inc. ("Central Florida"), Bible Broadcasting Network, Inc., Palm Bay Public Radio, Inc., Southwest Florida Community Radio, Inc., Mims Community Radio, Inc. and Hispanic Broadcast System, Inc. ("Hispanic"). Because the applicants proposed to serve different communities, the **Hearing Designation Order**, 7 FCC Rcd 1875 (MMB 1992) ("**HDO**") specified the following issue:

> 2. To determine : (a) the number of other reserved channel noncommercial educational FM services available in the proposed service area of each applicant, and the area and population served thereby; ... and (c) in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

By the time of the **Initial Decision**, only two applications, those

of Central Florida and Hispanic, remained for consideration.

3. Consistent with a ruling made at the prehearing conference, the **Initial Decision** correctly rejected evidence proffered by both Central Florida and Hispanic which sought to advance claims relative to Section 307(b) that were not contained in the joint engineering exhibit. (Tr. 9-11). The **Initial Decision** correctly determined that Central Florida's proposal to provide a second noncommercial educational reception service to 45,984 (or 33%) more persons than Hispanic warranted a dispositive Section 307(b) preference. Accordingly, the **Initial Decision** did not reach the contingent comparative issue, and it granted the application of Central Florida and denied that of Hispanic.

Questions Presented

Whether the Presiding Judge should have considered evidence pertaining to Section 307(b) that was not contained in the joint engineering exhibit?

Whether the ID correctly ruled that coverage differences existed between Central Florida and Hispanic?

Whether the nature of a noncommercial educational applicant's proposed programming is relevant in determining a Section 307(b) preference?

Whether the Presiding Judge should have enlarged the issues against Central Florida to determine the adequacy of its original engineering proposal?

Argument

The ID correctly limited consideration of Section 307(b) evidence to that contained in the joint engineering exhibit.

4. Hispanic contends that the Presiding Judge incorrectly

rejected Section 307(b) evidence proffered by Hispanic (Hispanic Ex. 7). That exhibit purported to show that Hispanic would provide a first Hispanic owned and operated Spanish-language station to approximately 200,000 Hispanic persons. The Presiding Judge ruled that, because the proposed evidence was not in the joint engineering exhibit, it would not be considered. Previously, the applicants had represented to the Presiding Judge that the Section 307(b) issue would be covered in the joint engineering exhibit. Further, in response to a specific question from the Presiding Judge, all of the applicants, including Hispanic, represented that they had agreed to abide by whatever the engineer found. (Tr. 9). In light of that representation, the Presiding Judge clearly indicated that an applicant's choice was to be a co-sponsor of the joint engineering exhibit or to submit its own engineering exhibit. (Tr. 10).

5. Hispanic contends that the Presiding Judge's ruling merely limited what engineering evidence could be submitted relative to the Section 307(b) issue and did not affect an applicant's ability to submit relevant non-engineering evidence. However, one of the purposes of the joint engineering exhibit was to show what populations would be served by each proposal. Hispanic does not suggest, much less show, that its Exhibit 7 figure of 200,000 Hispanics in its service area was derived in a manner consistent with the methodology employed by the joint engineering exhibit. Indeed, the rejected Hispanic exhibit plainly shows that its figure of 200,000 Hispanics is based on demographic information contained in a different Hispanic

exhibit, not the joint engineering exhibit. There is no evidence as to how many Hispanics there would be in Hispanic's service area if the calculation had been based on the joint engineering exhibit. Thus, Hispanic Exhibit 7 contains population evidence that is inconsistent with that contained in the joint engineering exhibit. Accordingly, the Presiding Judge correctly rejected Hispanic Exhibit 7.

6. Moreover, even if the Presiding Judge should have received Hispanic's Exhibit 7, Hispanic makes no attempt to demonstrate that consideration of that exhibit would have affected the outcome of this proceeding. In this regard, the Commission uses the following priorities in evaluating the relative merits of FM proposals under Section 307(b): (1) first full-time aural reception service; (2) second full-time aural reception service; (3) first local transmission service; and (4) other public interest matters. The second and third priorities have equal weight. **FM Channel Policies/Procedures**, 90 FCC 2d 88, 91-92 (1982); **Mighty-Mac Broadcasting Company, Inc.**, 101 FCC 2d 303, 308-09 (Rev. Bd. 1985), **rev. denied**, FCC 86-127, released March 24, 1986. These factors appear to apply to both commercial and noncommercial educational FM stations. **Cf. Valley Broadcasters, Inc.**, 5 FCC Rcd 2785 (1990). It appears that Hispanic's rejected evidence could only be considered under priority (4), while Central Florida's preference exists because of its clear superiority under priority (2). Accordingly, the Bureau submits that, even if Hispanic's Exhibit 7 should have been received, its rejection was harmless error.

The **ID** correctly ruled that coverage differences existed between Central Florida and Hispanic.

7. Hispanic suggests that because the ultimate engineering proposals of itself and Central Florida may be identical, the **Initial Decision** arbitrarily and capriciously awarded a dispositive preference to Central Florida for its superior second aural reception service proposal. This argument is nonsense. The joint engineering exhibit, which was co-sponsored by Hispanic, reflects the differences in the applicants' proposals as they existed on the "B" cut-off date. Subsequent changes would be considered only if they resulted in a loss of service. **See**, **generally**, **Women's Broadcasting Coalition, Inc.**, 59 RR 2d 730, 733 (1986) (subsequent history omitted). Any post-"B" cut-off date amendments which result in no change in coverage or in increases in coverage are not to be considered in the comparison of the applicants' technical proposals. Thus, Hispanic's argument that its not yet filed amendment should be considered in comparing its engineering proposal with that of Central Florida is simply wrong.

The nature of a noncommercial educational applicant's proposed programming is irrelevant in determining a Section 307(b) preference.

8. Hispanic submits that, because Central Florida's articles of incorporation limit its programs to those which are "Bible-based," the **ID**'s grant of Central Florida's application is contrary to Section 307(b) and to the First Amendment of the Constitution. In support, Hispanic cites Section 73.502 of the

Commission's Rules. That section provides in pertinent part that "the Commission will take into consideration the extent to which each application meets the requirements of any state-wide plan for noncommercial educational FM broadcast stations filed with the Commission...." However, Hispanic points to no plan filed with the Commission by the State of Florida, and it concedes that the section is not directly applicable to this proceeding.

9. Nonetheless, Hispanic contends that Section 73.502 sets forth Commission objectives for assuring that noncommercial stations are licensed in accordance with Section 307(b), and that section and the First Amendment are contravened by a grant to an entity whose programming serves religious, not secular, objectives. However, Hispanic has not cited any case or policy statement which would support its novel reading of Section 307(b) and the First Amendment, and there is nothing in the ID which suggests that the grant of Central Florida's application was based in any way on its programming. Thus, there appears to be no basis for Hispanic's claim that the grant of Central Florida's application offends either Section 307(b) or the First Amendment. Indeed, the Section 307(b) preference was given to Central Florida based on the number of persons who will receive broadcast service, not the nature of Central Florida's proposed programming. Moreover, the Commission did consider Central Florida's programming prior to the designation of its application in this proceeding. Had there been a question of whether Central Florida would provide a noncommercial educational broadcast service, an appropriate issue would have been specified. Cf.

Seattle Public Schools, 4 FCC Rcd 625, 627-31 (Rev. Bd. 1989). None was, and Hispanic has not established that one should have been. **Cf. Palm Bay Public Radio, Inc.**, 6 FCC Rcd 1772, 1773-74 (1991) (where the Commission denied a petition to deny which alleged, inter alia, that a noncommercial educational applicant submitted an insufficient programming proposal because processing standards do not dictate the specific goals required of an organizational applicant). **See also**, Section 73.503 of the Commission's Rules. Accordingly, Central Florida's proposed programming is irrelevant for determining a Section 307(b) preference, and Hispanic's exception should be denied.

Whether the Presiding Judge should have enlarged the issues against Central Florida to determine the adequacy of its original engineering proposal?

10. Hispanic excepts to the Presiding Judge's denial of Hispanic's motion to enlarge the issues against Central Florida. **See Memorandum Opinion and Order**, FCC 92M-875, released August 13, 1992 ("**MO&O**"). Although couched in terms suggesting that Central Florida's initial technical proposal did not comply with the Commission's rules, Hispanic's motion simply seeks to determine whether Central Florida had reasonable assurance of the availability of its originally specified transmitter site. As explained in the **MO&O**, Hispanic did not allege sufficient facts to warrant addition of the issue and reopening the record. In other words, Hispanic did not show that Central Florida did not have reasonable assurance of the availability of its originally specified site. Accordingly, Hispanic's exception should be

denied.

Ultimate Conclusion

11. For the reasons stated, Hispanic's exceptions to the **Initial Decision** should be denied.

Respectfully submitted,
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October 29, 1992

CERTIFICATE OF SERVICE

Michelle C. Mebane, a secretary in the Hearing Branch, Mass Media Bureau, certifies that she has on this 29th day of October, 1992, sent by regular United States mail, U.S. Government frank, copies of the foregoing "**Mass Media Bureau's Reply to Exceptions**" to:

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